Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
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	)	

REPLY COMMENTS OF
KMC TELECOM, INC. AND XSPEDIUS COMMUNICATIONS, LLC

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KMC Telecom, Inc. ("KMC") and Xspedius Communications, LLC ("Xspedius") (collectively "Joint Commenters"), through counsel, hereby submit their reply comments in response to the March 3, 2005 Further Notice of Proposed Rulemaking in the above-referenced proceeding.[1]

I. INTRODUCTION AND SUMMARY

Wide support exists for the Commission's fundamental goal of developing an intercarrier compensation regime that is unified across jurisdictions and technology platforms (*e.g.*, wireline and wireless). Indeed, in the approximate 3000 pages of comments filed, no party put forth any effort to distinguish between traffic type or jurisdiction based on cost or function. The reason is obvious – absolutely no cost or function-based distinction exists, either by traffic type or by jurisdiction.

Equally obvious from any review of the comments is that carriers have had a strong incentive to arbitrage the disparities in the existing scheme by attempting to collect high rates for traffic that they terminate and pay low rates for traffic that they originate. Indeed, certain carriers, most notably incumbent local exchange carriers ("ILECs") have consistently

1 *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, FCC 05-33, CC Docket No. 01-92 (rel. Mar. 3, 2005) ("FNPRM").

sought to eliminate the obligation to pay any compensation at all for certain types of traffic (*e.g.*, ISP-bound traffic). For example, many ILECs have tried to avoid paying intercarrier compensation for ISP-bound traffic even though the cost of terminating a call to an ISP is the same as any other type of call. At least one ILEC, BellSouth, has abandoned that effort and in its comments makes no distinction for any traffic type, ISP-bound or otherwise.

With this overarching agreement in place, the task before the Commission is to create a unified system that is both equitable and consistent with the many provisions of the Act that directly and indirectly touch on intercarrier compensation. In this regard, commenters roughly fall into two groups: those supporting a rate of zero (*i.e.*, “bill-and-keep”) for termination and those that support some positive rate. Of these two options, only a positive rate is consistent with pricing standards set forth in the Act and the Commission’s policy goals of encouraging facilities-based competition and alternative network deployment. Bill-and-keep, by contrast, will only lead to new versions of arbitrage whereby carriers seek to obtain free termination service from others, even though all parties acknowledge providing termination service costs money. Importantly, in the FNPRM, the Commission expressly stated that one of its “most important policies is to promote facilities-based competition in the marketplace,”[2] and cost recovery for network investment is critical to satisfying this goal.

Any comprehensive intercarrier compensation reform effort also should address transiting traffic. Again, the overarching point of intercarrier compensation is to reasonably encourage parties to interconnect with one another to ensure that traffic can flow unfettered across networks, regardless of the type of network being utilized or the type of service offered.

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[2] *Id.*, ¶ 31 (citation omitted).

Regarding implementation, the Joint Commenters submit that the Commission should focus on implementing the Act in a faithful way. Rates set by state commissions pursuant to sections 251 and 252 should be included in interconnection agreements entered into by the parties. In cases where parties are not directly interconnected, or where access traffic is at issue, the Commission should support tariffed-based intercarrier compensation arrangements that: (i) set rates no higher than the comparable TELRIC (or similar cost-based) rates and (ii) permit carriers to supersede tariffs through interconnection agreements. Finally, the Commission should make clear that any new scheme established institutes default rules, which may be modified by agreement of contracting parties, subject to other requirements of the Act (*e.g.*, filing with and approval by state commissions as necessary).

As for the administration of universal service funds ("USF"), there can be no doubt that the Commission needs to expand the base over which USF is assessed in order to make the program equitable and sustainable. USF administration must remain consistent with the Act, and accordingly, universal service support must be explicit, remain portable, and not guarantee a level of funding to any individual carrier. In addition, USF support must be carefully cabined to a limited number of services. USF funding is not a revenue assurance plan for carriers; rather it is a mechanism that ensures that consumers have access to reasonable telecommunications services – not all possible services. Accordingly, the Commission should avoid the temptation of utilizing universal service as a revenue assurance program for individual carriers in the wake of a decline in intercarrier compensation.

Finally, even with thousands of pages of comments filed, it remains unclear whether and to what extent the Commission may preempt state commission jurisdiction over intrastate access charges. Moreover, even among the parties that advocate state commission preemption, wide disagreement exists regarding the statutory basis for any such preemption. Given the legal uncertainty of such approach and an overarching desire for federal and state cooperation, the Commission should avoid, to the extent practicable, preempting state commissions. The Commission and the industry would best be served if this Commission and the states were able to reach consensus on a reasonable means of reforming intercarrier compensation.

II. ALL PARTIES AGREE THAT INTERCARRIER COMPENSATION RATES SHOULD BE UNIFORM (OR AT LEAST MORE UNIFORM), REGARDLESS OF JURISDICTION OR TECHNOLOGY

As the Joint Commenters noted in their initial comments and as confirmed by others, the Commission largely has described the scope of the problem correctly: the exiting kluge of compensation categories permits widely different compensation rates for otherwise identical functionality. At least one group of parties has stated that "every commentor agrees that the application of different rates for different traffic is inefficient where the switching and transport functions performed are the same."[3] The Commission should rectify these inconsistencies by unifying intercarrier compensation rates with a positive, cost-based rate. Any effort to mandate bill-and-keep would fail to pass muster under the statute, as would Verizon's contrived "value" proposal for intercarrier compensation.

[3] Time Warner Telecom, et al. Comments at 6. While this is nearly universally true, some parties without legal, cost, or policy basis have suggested that the Commission should continue to treat ISP-bound traffic different than any other type of traffic. *See, e.g.,* Verizon at n.20. Importantly, however, no party has put any evidence in the record suggesting that it costs a different amount to terminate ISP-bound traffic than any other kind of traffic.

A. A Positive, Cost-Based Rate For Intercarrier Compensation Is Required Under The Act

The weight of the record evidence filed demonstrates that a positive, cost-based rate for intercarrier compensation is required under the Act. The Act's relevant cost standards (sections 252(d)(1) and (d)(2)) both are easily satisfied with a positive, cost-based rate for intercarrier compensation. In addition, the undisputed record evidence demonstrates that carriers incur costs in terminating traffic – costs that do not vary by traffic type or jurisdiction – and that regulatory arbitrage has resulted from maintaining materially disparate rates for otherwise identical functionality. All carriers deserve equal compensation for equal work, and the best means of making this so is setting a uniform, usage-based methodology for determining intercarrier compensation.

1. The Commission must respect the Act's "additional cost" standard

As the Commission points out, it is "mindful of [its] obligation to comply with the statutory provisions governing intercarrier compensation, such as sections 251(b)(5) and 252(d)(2) of the Act."[4] Similarly, the Commission recognizes "that any unified regime requires reform of intrastate access charges, which are subject to state jurisdiction."[5] In their initial comments, the Joint Commenters stated that the Commission should maintain rates no lower than the ILEC's TELRIC rate for intercarrier compensation, and that point of view received substantial support in the record.[6] TELRIC may not be perfect, but it offers significant benefits.

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4 FNPRM at ¶ 63 (citing 47 U.S.C. §§ 251(b)(5), 252(d)(2)).

5 *Id.*

6 *See generally* Time Warner et al.; CBICC.

Foremost, TELRIC is consistent with the Act and indeed has been reviewed and sustained by the Supreme Court.[7] Furthermore, TELRIC satisfies the cost standards set forth in sections 252(d)(1) and 252(d)(2). As the Joint Commenters have explained at length, in the *Local Competition First Report and Order*, the Commission concluded that "the pricing standards established by section 252(d)(1) for interconnection and unbundled elements, and by section 252(d)(2) for transport and termination of traffic are sufficiently similar to permit the use of the same general methodologies for establishing rates under both statutory provisions."[8] Moreover, the Commission found that the statute's "additional cost" standard "permits the use of the forward-looking, economic cost-based pricing standard that the [Commission established] for interconnection and unbundled network elements."[9]

The only parties that have criticized use of TELRIC directly are the BOCs, who argue that TELRIC is too low or not sufficiently uniform,[10] not that it fails to satisfy the Act's additional cost standard. For its part, BellSouth would establish national presumptive rates for tandem and end office termination.[11] Although the rates stated by BellSouth are largely consistent with average TELRIC rates, it is unclear whether the Commission has authority to set a single national rate. The Commission does, however, have authority to define a rate methodology to be applied by the state commissions,[12] and that existing methodology is TELRIC. Finally, to the extent that others believe a higher rate is in order, the Joint Commenters

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7 *Verizon v. FCC* 535 U.S. 467 (2002).

8 Implementation of the *Local Competition Provisions of the Telecommuncations Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 at ¶ 1054 (1996).

9 *Id.*

10 *See, e.g.,* Verizon Comments at 18.

11 BellSouth Comments at 27.

12 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

have argued only that TELRIC serve as a rate floor. ILECs always have the option of filing new TELRIC studies to the extent they feel existing TELRIC rates are not reflective of their costs, or to seek methodological adjustments from the Commission.

2. The undisputed evidence in the record demonstrates that carriers incur costs in terminating traffic that do not vary by type of traffic

Perhaps most importantly, wholly absent from the record is any suggestion that the cost of termination varies at all by traffic type. BellSouth argues that its proposed "unified compensation system will correct the most pernicious deficiency that exists in the current process – multiple and disparate rates for similar functions."[13] Even Verizon concedes that "[a]ny default rule the Commission establishes should provide for positive rates and a more uniform rate structure for various types of traffic than exists currently."[14] Verizon does argue for an exception for ISP-bound traffic, but not on the basis of cost, but apparently because Verizon subjectively disdains this type of traffic.[15]

That existing arbitrary intercarrier compensation categories (the ICF identified ten (10) such categories) are the fundamental source of today's troubles is beyond dispute. As the National Cable Television Association ("NCTA") notes, "[t]here are not significant engineering or cost differences to a network provider for originating or terminating a minute of 'local' traffic, 'intraLATA toll' traffic, 'interstate' traffic, 'ISP-bound' traffic or 'wireless'

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13 BellSouth Comments at 32.
14 Verizon Comments at 4.
15 *Id*., n. 20.

traffic."[16] Accordingly, "no useful purpose is served by having different prices for handling these supposedly different 'types' of traffic."[17]

3. The record demonstrates that regulatory arbitrage results from carriers attempting to collect high rates for termination but pay low rates to terminate on other networks

As the Joint Commenters noted in their opening comments, regulatory arbitrage has resulted from carriers, notably the incumbents, attempting to maintain high intercarrier compensation rates for traffic in which they specialize (*e.g.*, access traffic), and pay little or no compensation for traffic sent to competitive networks (*e.g.*, ISP-bound traffic). Many of the comments submitted to the Commission underscore that this "collect high" and "pay low" approach to intercarrier compensation is the fundamental source of regulatory arbitrage, and that this arbitrage is the primary problem that must be eliminated through rate unification either nationally, or on a state-by-state basis.

NCTA aptly notes that "near-irresistible incentives for arbitrage and regulatory gamesmanship arise when large amounts of money depend on whether traffic is 'really' local or 'really' access or 'really' toll."[18] To remedy this incentive, "the Commission should move to minimize arbitrage by adopting a uniform rate structure for … traffic regardless of the identity of the service provider, the jurisdiction of the call, or the underlying technology (e.g., wireless, wireline, cable, etc.) with which the call was made."[19] Indeed, "there should be a uniform rate

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16 NCTA Comments at 4.
17 *Id.*
18 NCTA Comments at 4.
19 USTA Comments at 12.

structure that treats all functionally-equivalent traffic the same without regard to jurisdiction, service or technology."[20]

Even Verizon recognizes that "many of the concerns regarding the current regulatory scheme – and some of the primary opportunities for arbitrage – are rooted in the efforts by some carriers to evade the current rules in order to exploit the disparity between the interstate rates regulated by the Commission and the intrastate and local rates currently regulated by state commissions."[21] Concurring, BellSouth states in its comments that "[d]ifferent mechanisms with different rates for the same or similar network functions produced perverse incentives to disguise interexchange traffic in order to take advantage of low terminating rates associated with reciprocal compensation."[22] Qwest further notes that if "interstate traffic were exchanged on a bill-and-keep basis, while intrastate traffic were subject to a different scheme (such as the current tariff scheme), the resulting chaos and arbitrage opportunities would be unacceptable."[23]

At the same time Verizon recognizes that regulatory arbitrage results from jurisdictional disparities setting different rates for the same functionality, Verizon incorrectly claims that "one-size-fits-all regulatory solutions" are not helpful.[24] Verizon's premise is incorrect. The fundamental source of regulatory arbitrage is "the splintered approach to intercarrier compensation [that] has rewarded carriers who effectively engage in arbitrage by

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[20] *Id.*, iv.
[21] Verizon Comments at 6.
[22] BellSouth Comments at 3.
[23] Qwest Comments at 15.
[24] Verizon Comments at 7.

disguising traffic to take advantage of the lowest possible interconnection rate."[25] In contrast to Verizon's claim, a one-size-fits all (or at least a one-rate-applies to all) approach – would eliminate arbitrage opportunities and provide equal pay for equal work to all carriers.

Toward that unification end, the Joint Commenters support BellSouth's statement that any "new system be competitively neutral" and accordingly "should neither reward nor penalize a carrier on the basis of the market segments in which it chooses to compete."[26] Although the Joint Commenters do not support BellSouth's plan in total, on the compensation front the Joint Commenters agree that BellSouth's plan "corrects a fundamental flaw that is present in the current fractured compensation system – arbitrage."[27] To eliminate arbitrage, "under BellSouth's proposal there is no pecuniary incentive to disguise the type of call in order to pay a lower intercarrier compensation rate."[28]

4. All carriers deserve equal pay for equal work

Essentially all parties agree that intercarrier compensation reform should encourage investment in facilities and should be technologically and competitively neutral. To stay true to this underpinning of Commission policy, the Commission must enable carriers a fair, uniform means of recovering traffic termination costs. Put simply, all carrier deserve equal pay for equal work. In this context, carriers must have the ability to collect the same compensation for performing the same function (*i.e.*, termination) regardless of jurisdiction or traffic type.

The Joint Commenters also support the intercarrier compensation reform goals cited by the Commission. Any new approach to intercarrier compensation absolutely should

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25 BellSouth Comments at 45.
26 *Id.*, at 5.
27 *Id.*, at 7.
28 BellSouth Comments at 7.

promote economic efficiency and should encourage the efficient use of, and investment in, telecommunications networks, and the development of efficient competition. Reform also must respect and promote facilities-based competition in the marketplace.

To the extent any rate distinctions are maintained, those should be based on legitimate economic or technical differences, not artificial regulatory distinctions or subjective notions of inefficiency or value. Of course, as noted above, the record is entirely bereft of any such evidence, and accordingly, a uniform rate is appropriate.

5. The record demonstrates that per-minute charges are the most appropriate means of recovering termination costs

Although individual carriers have argued in favor of "connection" or "capacity" approaches to intercarrier compensation, no party has described why such a scheme would mark an improvement over the existing system or how it would be implemented. Moreover, BellSouth is the only party to submit in the record actual data (previously reviewed and endorsed by the Commission) on the usage-sensitive nature of switching, noting that "[o]verall, at least two-thirds of the investment of a typical switch is usage-sensitive."[29]

In addition, BellSouth reminds us that a transition to a capacity-based rate structure would "run afoul of the Commission's goal of ensuring that any new intercarrier compensation regime be 'competitively and technologically neutral.'"[30] Moreover, "[t]he billing system changes alone would be monumental, and neither EPG nor Home/PBT explains how such change could be made in a timely fashion or how the costs of such changes would be

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29 *Id.*, 24.
30 *Id.*, 13.

recovered."[31] In the FNPRM, the Commission suggested that termination rates should be flat-rated, rather than based on MOUs; however, the Commission similarly failed to describe how one could create a meaningful flat-rated termination rate, or how such a wholesale change would be paid for and implemented.

The existence of MOU-based intercarrier compensation rates is not part of the problem. Indeed, the Commission has repeatedly endorsed usage-based rates for switching and termination. For example, for over twenty years access charges have been usage sensitive. Moreover, the Commission endorsed usage-based rates for switching both as an unbundled network element (*i.e.*, UNE-P) and for reciprocal compensation in virtually every section 271 application filed by the BOC. Again, in the approximately 3000 pages of comments filed, no party has articulated a reasonable rationale for moving to a non-usage based compensation scheme for termination. BellSouth, by contrast, has included evidence that termination is usage-sensitive, and that it would be enormously expensive to supersede usage-based billing with some other system. For once, the Joint Commenters agree with BellSouth: at bottom, the problem is not whether a usage-based rate is appropriate, but rather what the usage-based rate should be.

B. The Commission May Not Mandate Bill-And-Keep

A number of wireless providers and cable operators support a bill-and-keep approach to termination. As demonstrated below, the Commission may not mandate bill-and-keep because doing so would violate the Act's cost standards and create new opportunities for regulatory arbitrage. That said, nothing precludes parties from agreeing to bill-and-keep on a voluntary basis.

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31 *Id.*, 14.

1. A bill-and-keep default rule would violate the Act's "additional cost" standard

In support of bill-and-keep, Qwest claims that the Commission's authority to mandate bill-and-keep flows from 252(d)(2)(A), which requires that any Commission intercarrier compensation rules must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network of the other carrier…." Qwest appears to believe that the Commission can contort this statutory language to preclude cost recovery from carriers so long as the Commission provides an alternative cost recovery means,[32] such as from end users or from universal service.

From a statutory perspective, although carriers voluntarily may agree to bill-and-keep, CBICC's supporters correctly point out that mandated bill and keep is unlawful "under [s]ection 252 [of the Act] when traffic is out of balance because" such a regime would preclude "'mutual recovery of costs.'"[33] In addition, for interstate traffic, a "rate of zero is not a just and reasonable rate under [s]ection 201."[34] As a policy matter, NARUC indicates that intercarrier compensation "should be designed to recover an appropriate portion of the requested carrier's applicable network cost."[35] Barring such cost recovery would discourage rather than encourage carriers "to interconnect, to carry traffic, and to provide high quality service to requesting carriers."[36] NASUCA adds that "[a]ny proposal for intercarrier compensation reform should

32 Qwest Comments at 28.
33 Pac-West Telecomm. et al. Comment at 13.
34 *Id.*
35 NARUC Principles at 2.
36 *Id.* at 2.

recognize that originating, transiting in or terminating telecommunications traffic imposes costs on originating, transporting and terminating carriers."[37]

The Joint Commenters firmly believe that as a statutory and a policy matter, carriers must bear the cost of putting traffic on other carriers' networks, and as described above, any mandatory bill-and-keep scheme would violate the Act, the Commission's rules, and sound policy. As a legal matter, the relevant ILEC's TELRIC cost of providing transport and termination is a reasonable minimum for all carriers.

2. A bill-and-keep default rule would codify regulatory arbitrage, not eliminate it

As BellSouth states, "bill-and-keep would not promote economic efficiency or preserve universal service, nor is bill-and-keep competitively neutral."[38] Indeed, Commission adoption of bill-and-keep would perpetuate arbitrage by effectively setting different termination rates for carriers. A simple example makes the point. Under bill-and-keep, if a carrier originates 100 minutes of traffic, but terminates only 10 minutes of traffic, that carrier would receive 90 minutes of termination for free. Other carriers would have to engage in the work necessary to terminate those 90 minutes of traffic, even if they received little or no free termination from others. Accordingly, a "default bill-and-keep rule … would encourage a whole new host of arbitrage opportunities"[39] by encouraging carriers to originate more traffic than they terminate.

Put another way, only in cases where carriers originate and terminate the same (or essentially the same) volume of traffic does bill-and-keep represent fair, just, and reasonable compensation. But, of course, the whole purpose of intercarrier compensation is for cost

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[37] NASUCA Comments at 4.
[38] BellSouth Comments at 9.
[39] Verizon Comments at 4.

recovery in instances where traffic imbalances exist. As BellSouth aptly points out, in today's world of specialization and free-flowing traffic, there is no reasonable basis for assuming (or encouraging) balanced flows of traffic between or among carriers.[40] Rather, the market place sends signals to carriers, and carriers seek to serve the market place.

For this reason, Verizon states that a rule "imposing a bill-and-keep arrangement for all traffic" would signal "disincentives for investment in network improvements, as network operators will be unable to recoup the value created by those investments and other providers will have strong incentives to free ride on the investments of network operators."[41] A reasonable and fair opportunity for cost recovery is a fundamental prerequisite to facilities deployment, and intercarrier compensation is an important revenue source. Allowing carriers to receive the benefit of others networks for free is antithetical to this Commission's stated desire to encourage investment in telecommunications infrastructure and to American free market principles. The Commission charted a proper course when it relegated substantive discussion of bill-and-keep to an appendix to the FNPRM, which was not voted on by the Commission. The Commission should now take the next step and leave bill-and-keep to parties that wish to enter such arrangements voluntarily.

C. Verizon's "Value" Proposal For Intercarrier Is Absurd And Has No Basis In Anything Other Than Verizon's Naked Self Interest

In what has to be the most aggressive of all proposals in this proceeding, Verizon advocates in favor of a "value" based regime for intercarrier compensation.[42] Of course, the word "value" (as opposed to cost) is the most obvious code for Verizon's desire to leverage its

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40 BellSouth Comments at 7.
41 Verizon Comments at 3.
42 *Id.*, 3.

legacy monopoly network to make all but perhaps the very largest carriers pay to send traffic to and receive traffic from Verizon. In effect, Verizon would like the ability to use its market power (perhaps soon to increase substantially by merger) to collect high intercarrier compensation rates but pay little or no compensation for the use of other smaller carriers' networks.

Fundamental to Verizon's view is that "interconnection does not always benefit both networks equally."[43] Of course, Verizon makes no argument regarding cost differentials related to traffic termination, because none exist. By attempting to shift the debate from the Act's additional cost standard (and cost-based foundation) to Verizon's subjective notion of negotiated "value," Verizon obviously hopes to maximize its termination monopoly across its footprint. With respect to local traffic, Verizon's concept has long since been rejected by the Act's standard of mutual and reciprocal compensation.

Of course, the superior value of competitive networks readily can be seen by the fact that consumers choose to be served by competitive local exchange carriers ("CLECs") them. Consumers should not, however, be forced to pay a premium (through asymmetrical intercarrier compensation or otherwise) in order to be served by a non-incumbent provider, such as Verizon, that seeks to reassert market power by virtue of a massive termination monopoly.

Interestingly, far from supporting the view that carriers with terminating network monopolies should have the ability to dictate terms to others on a "value" basis, Verizon Wireless argues that "[t]o be sustainable, inter-carrier compensation reform must establish consistent rules for all carriers, eliminating the hidden competitive advantages and subsidies that

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43 *Id.*

are prevalent today."[44] Indeed, the "existing reciprocal compensation and access charge regimes conflict because the costing methodology and carrier-specific service rules are different, thereby creating an incentive for carriers to engage in arbitrage. The FCC must harmonize these regimes and adopt technologically neutral rules to eliminate arbitrage opportunities and encourage fair competition among all service providers."[45] The Joint Commenters could not agree more.

For all these reasons, the Commission should reject Verizon's ostensible "value proposition" out of hand, as it fails to comport with the Act or the Commission's policy goals in this proceeding. No doubt we will see more of Verizon's proposal in any upcoming legislative debate and, at that time, parties will have an opportunity to discuss Verizon's interests and goals more thoroughly.

III. THE RECORD DEMONSTRATES THAT THE COMMISSION CAN AND SHOULD MANDATE TRANSITING OBLIGATIONS

Like so much of the debate in this proceeding, no party suggests that carriers should not engage in transiting traffic. Rather the debate centers around the proper rate for transiting service, and whether the Commission has authority to mandate such a rate.

For its part, BellSouth would relegate transiting arrangements solely to "voluntary, market-based arrangements," which BellSouth believes will eventually result in "an open and active transit market."[46] Although this is a laudable goal, BellSouth does not describe how this would happen. Qwest notes that "transiting services provided by any LEC" are interconnection services among carriers governed entirely be federal common carrier law (*i.e.*, [s]ections 201, 202 and 211(a) of the Act) as it relates to intercarrier interconnection outside of

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44 Verizon Wireless Comments at 4.
45 *Id.*, 4-5.
46 BellSouth at 20.

[s]ection 251(b) and (c) of the Act."[47] By contrast, consistent with the Joint Commenters, Cox Communications notes that section 251(c)(2) of the Act "provides a clear directive as to how transit arrangements for local traffic exchanged between incumbents and their competitors should be regulated."[48] To wit, "[t]he Commission and state regulators must determine whether rates, terms and conditions for transit services are just, reasonable, and nondiscriminatory."[49]

The Joint Commenters agree with the Commission's assessment that "the availability of transit service is increasingly critical to establishing indirect interconnection."[50] Indeed, without "the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks."[51] Transiting obligations ensure that traffic continues to flow across multiple networks and network platforms. For these reasons, Congress codified multiple provisions in the Act that govern transit service, including sections 201(a) (which places a transiting obligation on all interstate telecommunications carriers), 251(a) (which places a transiting obligation on all local exchange carriers), and 251(c)(2)(B) (which requires incumbent LECs to offer transiting as part of providing interconnection at any technically feasible point).[52]

Regarding rate structure, the Joint Commenters submit that TELRIC is a cost standard that yields reasonable minimum rates. By adopting TELRIC for transiting as well as other functionalities associated with intercarrier compensation, the Commission will go a long way toward avoiding a situation where a carrier lacks "the incentive to establish direct

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47 Qwest Comments at 7.
48 Cox Comments at 18.
49 *Id.*, 18.
50 *See* 47 U.S.C. § 251(a)(1).
51 FNPRM at ¶ 125.
52 47 U.S.C. §§ 201(a), 251(a)(1), and 251(c)(2).

connections even if traffic levels warrant it."[53] Simply put, once a carrier generates enough traffic to warrant direct interconnection, the carrier will have the economic incentive to do so. Importantly, however, the Commission must recognize that rate unification must transcend like functionality. Permitting a policy of establishing separate pricing methodologies for virtually identical functionality would serve only to recreate the very problems the Commission is attempting to eliminate in this proceeding.

As telecommunications networks evolve and develop, and robust transit competition emerges, that the Commission can provide pricing flexibility or some other regulatory relief to transiting carriers. At present, however, a transiting mandate with reasonable cost-based rates is necessary in order to encourage the seamless flow of communications across network and service modes at nondiscriminatory, cost-based rates.

IV. THE COMMISSION SHOULD ENDORSE TRAFFIC TERMINATION TARIFFS

In the FNPRM, the Commission rightly identified two primary vehicles for implementing intercarrier compensation regulations: tariffs and privately negotiated agreements. The Joint Commenters note that the Commission should utilize a combination of tariffs and private contracts to cover the entire jurisdictional waterfront that exists under the Act. By taking such a tack, the Commission will minimize the litigation risk that may result from a unique or novel implementation scheme.

To remain as true to the Act as possible, the Joint Competitors submit that rates set by state commissions pursuant to section 251 and 252 should be included in interconnection agreements entered into by the parties. In cases where parties are not directly interconnected, or

[53] FNPRM at ¶ 131.

where access traffic is at issue, the Commission should support tariffed-based intercarrier compensation arrangements that: (i) set rates no higher than the comparable TELRIC rates and (ii) permit carriers to supersede the tariff through interconnection agreements. Finally, the Commission should make clear that any new scheme established institutes default rules, which may be modified by agreement of contracting parties, subject to other requirements of the Act (*e.g.*, filing with and approval by state commissions). Such a simple approach to implementation is faithful to the Act, and therefore should be pursued by the Commission.

Wireless carrier interpretation of the Commission's recent decision in *T-Mobile*[54] has greatly increased the transactions costs associated with the exchange of traffic between wireless providers and non-incumbent carriers, such as the Joint Commenters. This results primarily from the fact that wireless providers have taken the position that, although the Commission provided a means for incumbents to require wireless providers to negotiate agreements through both interim rules and the risk of arbitration, CLECs have no such recourse.[55] As a result of this wireless carrier bootstrapping and intransigence, CLECs have had little leverage to bring wireless providers to the negotiating table to work out reasonable traffic termination arrangements.

In the context of CLEC access charges, the Commission successfully implemented a regime whereby a competitor's tariffed access rate is presumptively lawful so long as the competitor's rates are consistent with those of the relevant incumbent. In addition, parties have the ability to enter contracts if they desire. This system has encouraged the free flow

54 *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Declaratory Ruling and Report and Order (rel. Feb. 24, 2005) ("*T-Mobile*").
55 *Id.* ¶¶ 15-16.

of traffic, minimized transactions costs, and effectively eliminated disputes between CLEC and other carriers. The success and ease of administering this approach commends much to the Commission. Accordingly, the Joint Commenters submit that the Commission should endorse the use of tariffs with safe harbor rates for all intercarrier compensation, including wireless and transit traffic, and permit carriers to supersede any such tariffs with negotiated arrangements.

V. THE RECORD CONFIRMS THAT THE COMMISSION SHOULD TAKE NO ACTION TO DISRUPT EXITING NETWORK INTERCONNECTION RULES

The initial comments filed in this proceeding demonstrate that the Commission's existing interconnection rules largely are stable and well understood. Accordingly, the Commission "should avoid disruptive changes to existing interconnection architectures as it implements intercarrier compensation reform."[56] The Commission simply must recognize that "adoption of a new set of interconnection rules would serve primarily to upset settled expectations."[57]

Although virtually all parties agree that the Commission's longstanding network interconnection rules are well understood, certain litigation still continues. Xspedius for one has three complaints (going on four) pending against SBC on discrete interconnection issues. A mid-course change by the Commission would only create additional uncertainty and disruption to an area of the law that is largely stable and is becoming increasingly stable over time.

ICF's plan would radically alter the Commission's interconnection rules and regulations. Rather than treat carriers as equal "co-carriers," ICF classifies networks into three categories: (i) Hierarchical (tandems and end offices; BOCs); (ii) Rural Networks (RLECs,

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56 Verizon Comments at 5.

57 *Id.*, 5.

"Covered Rural Telephone Companies," or "CRTCs"); and (iii) Non-Hierarchical Networks (competitive LECs, wireless providers, and others). Thus, far from being "technology neutral" and "carrier neutral," ICF sets up a deliberate framework to discriminate against carriers based on their historical position. Similarly, although BellSouth's proposes a "default physical architecture" that seeks to take "advantage of existing arrangements,"[58] BellSouth's proposal is vague and offers no obvious improvement over existing arrangements. The existing interconnection rules may not be perfect, but they are largely understood by all parties. In this proceeding, the Commission should focus on correcting clear problems and preserving to the extent practicable items that are functional, including the existing interconnection rules. Either of these approaches would do nothing more than launch another decade of litigation and uncertainty for all carriers, and in the end lead to a discriminatory outcome.

VI. UNIVERSAL SERVICE REFORM SHOULD BE COMPETITIVELY NEUTRAL

As SBC notes, "[c]uts to one source of revenues must be matched by substantially equivalent new revenue opportunities, whether through adjustments to end user charges or through new universal service funding mechanisms"[59] (so much for deregulation). To the extent this holds true for ILECs, it must hold true for all non-ILECs, as well.

Regarding universal service, new entrants generally support universal service mechanisms that are simple to administer, portable, and that guarantee no individual carrier level of funding. Western Wireless, for example, states that universal service must be "explicit,

[58] BellSouth Comments at 18.
[59] SBC Comments at 16.

sufficient, competitively-neutral, and 'unified.'"[60] More specifically, Western Wireless seeks to "[r]eplace all existing USF mechanisms with a unified high-cost universal service mechanism that would be fully portable to all designated ETCs operating in a geographic area, and that would calculate support for all eligible carriers based on the forward-looking economic costs of providing the supported universal service in an area using the least-cost technology."[61] CTIA similarly supports the creation of a single, unified high-cost universal service support mechanism that calculates support based on the forward-looking economic cost of service customers in a particular geographic area.[62]

On the other hand, ICF, CBICC, and the various rural groups advocate universal service mechanisms designed largely to make up for decreases in intercarrier compensation payments. These various mechanisms are designed with specific ILECs in mind, and funding is not portable to others. ICF, for example, seeks to establish a Transitional Network Recovery Mechanism that by its terms only is available to carrier that "lose access revenues as a result of the [implementing the ICF] plan."[63] CBICC similarly seeks to allow rural ILECs to recover access revenue losses from universal service mechanisms, to the extent such losses exceed federal Subscriber Line Charge ("SLC") increases.[64] For one, EPG proposes an Access Restructure Charge that would be implemented to make up any revenue shortfall of intrastate access charges.[65]

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60 Outline of Western Wireless Intercarrier Compensation Plan, Ex Parte, CC Docket No. 01-92, at 1 (Oct. 18, 2004).
61 *Id.* at 2.
62 CTIA Comments at 38.
63 ICF Ex Parte, CC Docket No. 01-92, at 4 (Aug. 16, 2004).
64 CBICC at 2.
65 FNPRM ¶ 46.

The Joint Commenters submit that any new universal service reform must be done in a way that supports high-cost areas through vehicles that are consistent with the Act. The most straightforward means of doing so is by endorsing a single, explicit high-cost universal service mechanism based on the forward-looking cost of providing service using efficient technology. Only by limiting funding to forward-looking economic costs will the Commission have any hopes of ensuring that USF support grows no more quickly than the reasonable need for affordable telephone service. Moreover, to encourage the deployment of new technologies and services, USF support must be portable across carriers. Otherwise, new facilities-based investment will be discouraged in rural areas, and consumers in high-cost areas will have little hope of benefiting from the dynamic changes that continue to take place in communications.

The same holds true for regulated end user charges. Under ICF, at the same time rates get restructured down, the residential SLC gets ratcheted up from $6.50 to $10.00 over four years. This again highlights the myriad ways that ICF unfairly favors ILECs. As a practical matter, incumbents are the only carriers that provide any meaningful level of basic local exchange service to residential consumers. The one currently successful competitive residential entry vehicle for this type of service – UNE-P – has been eliminated. Also, under section 251(c)(4) resale, the incumbent – not the competitor – is entitled to collect access charges, including the SLC. Thus, by stepping up the SLC, the ICF provides revenue assurance for the ILECs and offers nothing to the many facilities-based competitors in the business market, other than accelerated rate reductions and a daunting revenue gap.

The Commission should permit SLC increases on a nondiscriminatory basis across residential and business lines. In this regard, Qwest's proposal to increase the "federal

SLC" as part of an increase in both "residential and business rates"[66] is superior to ICF's focus on residential SLC increases only. ICF's proposal could irreparably harm CLEC businesses, including many carriers that have been the primary risk takers in the development of competitive markets.

As for USF collections mechanisms, NCTA argues that "the current revenue-based scheme should be replaced with a number-based contribution mechanism without assessing cable broadband, DSL, or other high-speed Internet access services."[67] ICF, by contrast, proposes creation of a new contribution methodology based on "units." Essentially, each working telephone number would be assessed one unit, and residential DSL, cable modem, and other high-speed connections would be assessed a single unit. For business connections, dedicated network connections would be assessed 1-100 units, depending on capacity.

Neither NCTA, ICF, nor any other party advocating a change in the universal funding mechanisms has explained why telephone number use, units, or connections serve as a proper, or even reasonable proxy for assessing universal service obligations. Moreover, each of those approaches encourages carriers to minimize universal service payments by gaming use of telephone numbers, mix of units, and number/type of connections. The Commission's existing revenue-based system is simple to administer and well-understood. That said, problems do exist regarding whether and to what extent revenues are associated with "telecommunications services" or "information services." However, adoption of a telephone number-based or similar proposal or otherwise would do nothing to alleviate those concerns. Rather, as the network

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66 Qwest Comments at 12.
67 NCTA Comments at 5.

evolves, the Commission will need to make difficult choices with regard to how it identifies services and revenue streams on which universal service is properly owed.

VII. TO THE EXTENT PRACTICABLE, THE COMMISSION SHOULD AVOID STATE COMMISSION PREEMPTION

In the FNPRM, the Commission also seeks comment on use of its forbearance and preemption authority as a means of achieving its unification goals. Specifically, the Commission seeks comment on whether it should use its section 10 forbearance authority to forbear from application of section 251(b)(5)'s requirements[68] and whether it has the authority to preempt the intrastate access charge regime that presently exists.[69] The Joint Commenters submit that the Commission should avoid, to the extent possible, efforts to utilize its forbearance and preemption powers as it moves to unify the existing disparate intercarrier compensation regimes. Indeed, as the Commission outlined in the FNPRM, serious legal questions exist regarding whether the Commission may forbear from section 251(b)(5) or utilize preemption to harmonize intrastate access charges with other jurisdictional forms of intercarrier compensation.

In the FNPRM, the Commission appropriately seeks comment on its "authority over intrastate access reform, and specifically whether the changes brought by the 1996 Act give the Commission the power to assert authority over the intrastate charges at issue in this proceeding."[70] The Commission also seeks comment on whether it may preempt state authority over intrastate access through use of the Commission's section 254 duty to "rationalize universal service support."[71] Although there can be no doubt that the Commission has such a duty, it is far

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68 FNRPM at ¶¶ 74-76.

69 *Id.* at ¶ 82.

70 FNPRM at ¶ 82.

71 *Id.,* citing ICF Supporting Brief at 35.

from clear that this provision of the Act gives the Commission authority to preempt the existing intrastate access regime. Indeed, section 254 makes no mention of preemption. Accordingly the Commission should move cautiously, if at all, in this direction. If the Commission's reform measures have beneficial results – which the Joint Commenters expect it will – the states can follow in the Commission's footsteps with appropriate, state-specific reform.

As the Joint Commenters indicated in their comments, the Commission should avoid novel theories to bootstrap authority over intrastate access charges. As an example of approaches to be avoided, in the FNPRM the Commission suggests the possibility of invoking the "mixed use" doctrine to establish that it is impractical to separate interstate and intrastate access traffic.[72] BellSouth and Verizon agree that the Commission can preempt the states, but disagree on the relevant statutory provisions.[73]

Novel jurisdictional theories will produce novel judicial risk. To avoid such needless risk, the Joint Commenters submit that all parties would be better off if the Commission could work out an arrangement with the state commissions through a Joint Board. NARUC has articulated intercarrier compensation reform principles that are consistent with the Commission's goals, and NARUC has devoted substantial resources to developing a comprehensive reform plan. In the first instance, the Commission should attempt to come to a mutually agreed-upon solution with the state commissions. Only if such a pursuit first proves fruitless should the Commission consider other measures, such as preemption or forbearance.

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72 *Id.* at ¶ 80.

73 Verizon Comments at 34-37; BellSouth Comments at 41-43.

VIII. CONCLUSION

For the reasons set forth herein, the Joint Commenters support the Commission's effort to unify the existing, disparate intercarrier compensation regimes in accordance with the Act and the Commission's policy of encouraging facilities-based competition.

Respectfully submitted,

/s/

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